No. 98-1487

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL D. DIEDERICH, JR.,

Petitioner,

—v.—

THE COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF, COUNTY EXECUTIVE and PAUL NOWICKI, COUNTY ATTORNEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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For Petitioner

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This is not a factually unique case, but rather is a case involving fundamental constitutional principles of national importance and application. The Court must uphold the Constitution in this case, so that tens of thousands of attorneys and professionals who choose to enter public service nationwide can (at least when their employment is not "political") enjoy basic First Amendment freedoms, and be encouraged to be professionals, not party hacks.

Moreover, this Court should grant certiorari to give State and local governments the ability to delineate the limited situations where high-ranking public employees are properly "exempt" from civil service and First Amendment protection because of political needs, as distinguished from the *Branti/Elrod* instruction that patronage dismissals are generally impermissible. This is a "bright line": the Court should uphold New York law, including the First Amendment protection it affords to civil servants hired upon merit into a "non-competitive" classified civil service position.[1]

If the Court declines to grant certiorari here, it will essentially deny government attorneys, as a nationwide class, the First Amendment rights enjoyed by other citizens, and encourage cronyism and patronage-based opportunities in direct contravention of a State's choice that civil service be based only upon merit. States and localities will be unable to grant First Amendment protection to their civil servants because, as the Second Circuit has said, this is merely "one factor" in deciding whether to afford First Amendment protection. If the decision below is allow to stand, civil service status will be trumped by the notion that attorneys are always exempt because their jobs are "policymaking," "confidential," or otherwise require "shared ideology." Such disregard for State civil service law turns

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[1] The New York statute by its terms protects "noncompetitive" class employees against politically-motivated adverse job action. Respondents' citation to the 1935 *Merriweather* case, decided 4-3 by the New York Court of Appeals, and *Merriweather's* progeny, is inapposite because *Merriweather* (involving a low-level employee) would be decided differently today in light of this Court's *Branti/Elrod* jurisprudence.

federalism on its head, and reflects antidemocratic federal judicial activism.

In this case, it was an affront to this Court's teachings for the lower courts to hold that attorneys are *per se* exempt from First Amendment protection despite undisputed evidence here that:

- appellant's part-time attorney position was "low level";
- all the more senior (full-time) attorneys were not subject to partisan dismissal, even though Democrats;
- appellant's position was neither confidential nor policy-making;
- Appellant was replaced for political reasons despite respondents' official denial that the discharge of appellant and the Gordon plaintiffs were, or should be, influenced by politics;
- appellant's replacement was offered protection against partisan discharge—a "competitive" title.

Based upon the above, a jury would certainly find that the political justification offered for terminating appellant's employment was a sham, just as the jury found in *Gordon*. The refusal here, and in certain other circuits, to present the factual question of "political discrimination"[2] to a jury denies the litigant and the public of the most appropriate decisionmaker—a jury of citizens with a direct interest in local democracy.

As to appellant's other points, respondents have not shown why this Court should not review the lower courts' serious legal error regarding the Section 1983 First Amendment retribution claim, nor why it should not review the novel Guaranty Clause issue regarding the circuit court's condoning

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[2] Juries make similar factual determinations in race, gender and age discrimination cases each day, throughout the land. First Amendment discrimination should not be treated differently.

municipal deception amounting to "informational gerrymandering."

The facts in this case are undisputed and compellingly favor appellant. Respondents' several "red herring" comments,[3] designed to divert the Court's attention, simply do not contradict the basic facts set forth in appellant's petition.

Conclusion

This case is of great importance to American society, because local democracy and governance are directly impacted by the role played by educated civil servants, including lawyers. A grant of certiorari in this case is imperative, as seen by the compelling issues of law set forth in the petition for certiorari.

Dated: *April 26, 1999*

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[3] Respondents seek to confuse the facts and the legal argument. First, respondents refer to appellant as a confidential employee and policymaker. However, the record does not support such characterization. On the contrary, an adjudication by the New York State Public Employees Relations Board adjudicated appellant's job as neither confidential nor managerial for collective bargaining purposes. JA 145-46. Second, respondents assert, at p. 6, that this certiorari petition is "almost identical" to the petition in *Gordon*, which it most certainly is not. Third, respondents reference a May 3, 1994 retainer agreement which appellant executed after his March 1994 patronage-based discharge as a civil servant (appellant was re-hired as an independent contractor by respondents). JA 56. This agreement is thus irrelevant to the patronage discharge issues in this case. Fourth, respondents assert, at pp. 25-26, that appellant is claiming fully-protected civil service status requiring "for cause" termination, when in fact appellant seeks only protection against politically motivated termination. Finally, respondents imply, at p. 24, that appellant faced a partisan role vis-a-vis the Legislature, his department head, and other instruments of government when, in fact, appellant's department head, the Democratic legislature, and other bodies and boards remained politically intact after the election of a Republican county executive, respondent Vanderhoef.